

Before the  
Federal Communications Commission  
Washington, D.C. 20554

FCC MAIL STOP

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DISPATCH

MM Docket No. 93-54

In re Applications of

GAF BROADCASTING  
COMPANY, INC.

File No. BRH-910201WL

For Renewal of License of  
Station WNCN(FM) (104.3 MHz)  
New York, New YorkCLASS  
ENTERTAINMENT AND  
COMMUNICATIONS, L.P.

File No. BPH-910430ME

For a Construction Permit for a  
New FM Station, Channel 104.3 MHz,  
New York, New York

## MEMORANDUM OPINION AND ORDER

Adopted: September 1, 1993; Released: September 13, 1993

By the Review Board: MARINO (Chairman), and  
GREENE. Board Member BLUMENTHAL absent.

1. The Review Board has under consideration an appeal filed June 22, 1993 by Listeners' Guild, Inc. (Guild) from the *Memorandum Opinion and Order*, FCC 93M-360, released June 15, 1993, of Administrative Law Judge Joseph Chachkin (ALJ), which denied appellant's petition for intervention and motion to enlarge issues in this proceeding. On July 2, 1993, GAF Broadcasting Company, Inc. (GAF) and the Chief, Mass Media Bureau filed oppositions to Guild's appeal, and, on August 24, 1993, GAF filed further comments.

<sup>1</sup> In relevant part, the pertinent intervention rules provide as follows:

(a) Where, in cases involving applications for construction permits and station licenses, or modifications or renewals thereof, the Commission has failed to notify and name as a party to the hearing any person who qualifies as a party in interest, such person may acquire the status of a party by filing, under oath and not more than 30 days after the publication in the *Federal Register* of the hearing issues or any substantial amendment thereto, a petition for intervention showing the basis of its interest....

(b) Any other person desiring to participate as a party in any hearing may file a petition for leave to intervene not later than 30 days after the publication in the *Federal*

2. Guild's intervention request was premised on two grounds: first, that it is entitled to intervene as a party as of right under 47 CFR 1.223(a) because it filed a petition to deny GAF's renewal application, and, second, that it would be appropriate in any case to permit it to intervene under 47 CFR 1.223(b) because of its long history of involvement in proceedings before the Commission and the courts involving GAF and WNCN(FM), which makes it uniquely qualified to assist the Commission in determining the hearing issues specified in the *Hearing Designation Order* (HDO), 8 FCC Rcd 1742 (ASD 1993), and in Guild's accompanying motion to enlarge issues.<sup>1</sup> The ALJ rejected Guild's arguments under Section 1.223(a) because the HDO denied Guild's petition to deny and did not designate for hearing any of the issues it requested. And, under 1.223(b), the ALJ held that Guild failed to demonstrate how its intervention would assist the Commission in the resolution of the issues that were designated. The ALJ also denied Guild's enlargement motion which sought abuse of process and EEO issues, pointing out that the same abuse of process arguments were raised in its petition to deny and were considered and rejected in the HDO, and that its contentions with regard to GAF's EEO performance were expressly referred to the Commission's EEO Branch for disposition by the HDO.

3. Guild's appeal modifies somewhat its position advanced before the ALJ. Specifically as to its intervention request, it argues that the HDO denied its petition to deny only "to the extent indicated" therein and is thus no basis for rejection of its intervenor status. As to its motion to enlarge, Guild argues that the HDO may not have considered the specific pleading filed by GAF upon which Guild based its allegations of EEO improprieties by GAF, and that the HDO mischaracterized and thus did not provide a reasoned analysis of Guild's proposed issue pertaining to GAF's alleged abuse of the Commission's processes. We affirm the ALJ's rulings and deny Guild's appeal.

4. The HDO herein accorded Guild status as a petitioner because its organization consists of listeners of WNCN(FM) who reside in the New York metropolitan area. See 8 FCC Rcd 1746, at ¶ 30; see generally *Standing of a Party to Petition to Deny*, 82 FCC 2d 89, 98-99 (1980). Its petition to deny, however, was denied except to the limited extent that any allegations which related to WNCN(FM)'s EEO program and practices were referred to the Mass Media Bureau's EEO Branch for disposition. *Id.*, at 1747, ¶¶ 45, 46. As a consequence, Guild is not entitled to party status at this time, as was made clear in the Commission's recent

*Register* of the full text or a summary of the order designating an application for hearing or any substantial amendment thereto. The petition must set forth the interest of petitioner in the proceedings, must show how such petitioner's participation will assist the Commission in the determination of the issues in question, must set forth any proposed issues in addition to those already designated for hearing, and must be accompanied by the affidavit of a person with knowledge as to the facts set forth in the petition. The presiding officer, in his discretion, may grant or deny such petition or may permit intervention by such persons limited to a particular stage of the proceeding.

*Memorandum Opinion and Order*, FCC 93-385, released August 16, 1993, which denied Guild's petition for reconsideration of the *HDO*. Therein, the Commission rejected Guild's contentions that the *HDO* erred in excluding the EEO issue from the hearing and in not naming Guild as a party to the hearing proceeding. The Commission explained that, after the EEO Branch reports its findings and recommendations to the ALJ, he will determine what consideration, if any, should be given the EEO allegations and, at that time:

If a basic qualifying issue is specified against GAF based on Guild's allegations, Guild would, of course, be entitled to status as a party to this proceeding.... [I]f it is determined that no substantial and material question of fact has been raised concerning GAF's EEO program and practices, Guild would still have any appeal rights to which it would be entitled by virtue of its filing a petition to deny.

*Id.* at ¶ 5. The Commission summarized:

Guild's participation is premised on the specification of issues against GAF which Guild raised in a petition to deny the WNCN(FN) renewal application. Because the matters raised in the petition to deny were either rejected or referred to the EEO Branch for consideration, there is no justification, at this time, for making Guild a party to this proceeding.

*Id.* at ¶ 8. The Board, of course, is bound by the Commission's analysis. *Atlantic Broadcasting Co.*, 5 FCC 2d 717 (1966).

5. It follows from the foregoing that Guild's contentions that the ALJ should nevertheless have granted it discretionary intervention under 47 CFR 1.223(b) and enlarged the issues are meritless. Guild is unable to meet section 1.223(b)'s required showing of how its participation will assist in the determination of the issues in question since none of the issues it wished to address have been designated. See *Listeners' Guild, Inc. v. FCC*, 813 F.2d 465, 470 (1987) ("A broad undifferentiated desire to participate does not satisfy the strictures of the intervention rule.") Finally, as for its motion to enlarge, as already indicated, all EEO-related matters have been referred to the EEO Branch for its evaluation, and, contrary to Guild's assertion, its abuse of process arguments were expressly considered and rejected by the *HDO* and, now, by the full Commission. See 8 FCC Rcd at 1746, ¶ 33; FCC 93-385, at ¶ 6.<sup>2</sup> No further treatment can be given these matters by the Board. See *Bennett Gilbert Gaines*, 8 FCC Rcd 1405, 1409 (Rev. Bd. 1993).

6. ACCORDINGLY, IT IS ORDERED, That the appeal filed June 22, 1993 by Listeners' Guild, Inc. IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Joseph A. Marino  
Chairman, Review Board

<sup>2</sup> In denying reconsideration, the Commission also clarified an ambiguity in existing policy to emphasize that allegations of rule violations, including EEO rules, may be relevant to a licensee's claim to a renewal expectancy. Accordingly, the ALJ herein will have discretion to add an issue, if appropriate, to

examine deficiencies in GAF's EEO program and practices that may relate to the renewal expectancy determination. FCC 93-385, at ¶ ¶ 19-21. If such an issue is added based on Guild's allegations, Guild would then be entitled to status as a party to the hearing. *Id.* at ¶ 5.